

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Kenneth G. McDonald,

Case No. 2:23-cv-00130-CDS-EJY

Plaintiff

V.

Charles Daniels et al

Order Screening First Amended Complaint and Referring Pending Motions

Defendants

[ECF Nos. 1, 8, 11, 12, 13]

8
9 State prisoner Kenneth McDonald brings this civil-rights action under 42 U.S.C. § 1983
10 to redress constitutional violations that he claims to have suffered while he was incarcerated at
11 Southern Desert Correctional Center (SDCC). *See* ECF No. 7. On June 6, 2023, I screened
12 McDonald’s original complaint, allowing some claims to proceed, dismissing others with
13 prejudice, and dismissing the remaining claims with leave to file a first amended complaint by
14 September 5, 2023, if he so chose. ECF No. 6. I deferred ruling on McDonald’s application to
15 proceed *in forma pauperis*. *Id.* at 21. And I referred this matter to the court’s Pro Bono Counsel
16 Program for the purpose of finding counsel willing to be appointed as McDonald’s pro bono
17 counsel for the limited scope of participating in the Court’s Inmate Early Mediation Program. *Id.*
18 at 20–22.

19 McDonald timely filed his first amended complaint (FAC). ECF No. 8. He also filed a
20 notice about Doe defendants that I construe as a motion seeking to substitute the true names of
21 three Doe defendants. ECF No. 10. He moves for an order requiring defendants to preserve all
22 evidence about the matters at issue in the FAC. ECF No. 11. And McDonald moves for: (1) a
23 temporary restraining order and a preliminary injunction requiring that he remain housed at
24 Lovelock Correctional Center (“LCC”); (2) appointed counsel; (3) an order directing defendants
25 to not retaliate against him; and (4) an order directing defendants to provide him medical care.
26 ECF Nos. 12, 13.

27

I now screen McDonald's FAC under 28 U.S.C. § 1915A. Having done so, I find that McDonald states colorable claims under the First Amendment about retaliation, the Eighth Amendment about indifference to safety threats, and the Fourteenth Amendment Equal Protection Clause, so those claims may proceed. McDonald again fails to state a colorable claim under the First and Fourteenth Amendments about the right to access the courts, and I find that further leave to amend would be futile. So that claim is dismissed with prejudice.

I construe McDonald's notice about Doe defendants as motion to substitute the true names of three Doe defendants and grant him that relief. I defer ruling on McDonald's application to proceed *in forma pauperis* and motions to preserve discovery and for a temporary restraining order and a preliminary injunction. Finally, because the court has not yet located counsel willing to be appointed as McDonald's pro bono counsel, and this matter has been pending for some time, I give McDonald 30 days to file a notice informing the court how he wants to proceed in this action.

I. Notice about Doe defendants

McDonald filed a notice stating that because he's been transferred to LCC, he now feels safe revealing the true names of three Doe defendants. ECF No. 10. I construe McDonald's notice as a motion seeking to substitute the true names of those defendants, and I grant him that relief. Moreland is substituted for John Doe #1, Mikeals is substituted for John Doe #2, and Tate is substituted for John Doe #3.

II. Screening standard

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or an officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous or malicious, or that fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1)(2). All or part of the complaint may be dismissed sua sponte if the prisoner's claims lack an arguable basis in law or fact. This includes claims based on legal conclusions that are untenable, like claims against defendants who are immune from suit or claims of infringement of a

1 legal interest which clearly does not exist, as well as claims based on fanciful factual allegations or
 2 fantastic or delusional scenarios. *See Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989), superseded on
 3 other grounds by 28 U.S.C. § 1915(e); see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

4 Dismissal for failure to state a claim is proper only if the plaintiff clearly cannot prove any
 5 set of facts in support of the claim that would entitle him or her to relief. *See Morley v. Walker*, 175
 6 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes all allegations of
 7 material fact as true and construes them in the light most favorable to the plaintiff. *See Warshaw v.*
 8 *Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a pro se complainant are held to less
 9 stringent standards than formal pleadings drafted by lawyers, but a plaintiff must provide more
 10 than mere labels and conclusions. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); see also *Balistrieri v. Pacifica*
 11 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990) (recognizing that pro se pleadings must be liberally
 12 construed); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “While legal conclusions can
 13 provide the framework of a complaint, they must be supported with factual allegations.” *Ashcroft v.*
 14 *Iqbal*, 556 U.S. 662, 679 (2009). “Determining whether a complaint states a plausible claim for
 15 relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial
 16 experience and common sense.” *Id.*

17 III. Screening of FAC

18 A. McDonald’s factual allegations¹

19 McDonald is a 45-year-old prisoner who has been in the custody of the Nevada
 20 Department of Corrections for 28 years. When McDonald arrived at SDCC on January 27, 2021,
 21 his property was screened by Senior Correctional Officer Moran, who labeled 90 percent of it as
 22 unauthorized. McDonald checked a box on the property form indicating that he was appealing
 23 Moran’s decision. The appeal went unaddressed for five months.

24 Among McDonald’s confiscated property was legal work related to his civil-rights action
 25 styled *McDonald v. Williams*, Case No. 2:17-cv-03066-RFB-DJA (*McDonald I*). McDonald told Moran
 26 on January 27 that he needed his legal work, but she refused to let him have it upon learning it
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28 ¹ This is merely a summary of the allegations in the FAC, see ECF No. 8 at 5–42, and should not be construed as findings of fact.

1 pertained to a civil suit against NDOC officials. “[T]his had a direct impact on [McDonald’s]
 2 ability to properly litigate his suit.”

3 On June 2, 2021, McDonald was ordered to the property room where Moran pulled out
 4 the bags containing McDonald’s confiscated property, removed the DOC 1517 forms from each bag
 5 and wrote on them, which effectively disrupted and stopped the administrative appeals process.
 6 Moran handed McDonald his hot pot, radio, and religious book. McDonald asked Moran for his
 7 legal work, explaining he needed it for discovery in *McDonald I*, which had been ordered that day.
 8 Moran responded, “You won’t be getting any of that back for sure.” Moran purposefully destroyed
 9 the rest of McDonald’s confiscated property soon after to “chill and/or stop” his litigation efforts
 10 and to “retaliate” against him.

11 On July 1, 6, 12, 13, 14, 16 and 21, 2021, SDCC officials prevented McDonald from sending
 12 legal mail, stating that office was closed. Other inmates were allowed to send their legal mail on
 13 these dates. McDonald filed an emergency grievance on July 14, 2021, about this issue. Tate yelled
 14 at McDonald in front of the entire tier about the grievance stating, “File more grievances and I will
 15 shake the unit down.” Unable to send his discovery, McDonald was forced to settle his claims in
 16 *McDonald I*.

17 On July 20, 2021, McDonald submitted a request for caselaw research or to check out
 18 material at the law library. John Doe #4 denied his request stating, “No way to find this
 19 information. Do not return. Void.” Other inmates received their research requests.

20 On July 21, 2021, McDonald had a teleconference with Deputy Attorney General Mr. Guy
 21 for a mediation conference order in his civil-rights action styled *McDonald v. Dzurenda*, Case
 22 No. 2:19-cv-01329-JAD-DJA (*McDonald II*). McDonald reached a settlement in *McDonald II* for
 23 Moran to release McDonald’s property that she confiscated as unauthorized in January 2021.
 24 Consistent with that agreement, McDonald was escorted to the property room on July 26, 2021,
 25 by Caseworker Saterly. Moran acknowledged receiving a call from Mr. Guy and stated, “let’s get
 26 you your property.” A worried look came over Moran’s face as she read McDonald’s property card,
 27 and she turned to Saterly and stated, with panic in her voice, “I destroyed it.” McDonald
 28 explained that Moran had not followed proper procedure: because he checked a box on the forms

1 appealing her determination that the property was unauthorized, it could not have been
2 destroyed without a hearing. Moran then showcased to McDonald other prisoners' confiscated
3 property, and he was allowed to select some of those items in settlement of *McDonald II*.

4 Moran's supervisors purposefully kept her in the property room beyond the two-year
5 limit on corrections officers being assigned a certain post or area. Supervisors did so despite
6 knowing that Moran did not adhere to the department or prison's policies and regulations
7 regarding inmate property. Many inmates have filed grievances against Moran about property
8 issues.

9 On February 8, 2022, McDonald had a teleconference with Deputy Attorney General
10 Austin T. Barnum about *McDonald I* in which a settlement was reached. McDonald expressed his
11 concern about SDCC Associate Warden Jennifer Nash and Moran's conduct purposefully denying
12 him a stereo. Barnum assured McDonald that wouldn't happen.

13 Nine days later, McDonald was ordered to report to SDCC administration building B4.
14 After McDonald arrived, Nash and six correctional officers surrounded him to intimidate him.
15 During their conversation, Nash tried to steer McDonald into purchasing a stereo that she liked.
16 McDonald responded that he was sticking with what the settlement agreement allowed.

17 Nash ordered McDonald to the administration building knowing that by doing so, the
18 other inmates would label McDonald as an informant or snitch. Other inmates saw McDonald
19 leaving the administration building alone. Inmates do not speak with prison officials without
20 another inmate present to overhear what's being said. This prevents inmates from informing on
21 one another. McDonald is not an informant. Prison officials know the inmates' preference not to
22 speak with them alone.

23 In March 2022, McDonald ordered a boom-box stereo (Toshiba-T4-CMU500) from an
24 outside vendor, and had it shipped to SDCC care of Nash, as she directed him to do on February
25 17. No other inmates settling their claims against prison officials are required to send purchases to
26 the care of Nash. On March 22, 2022, McDonald was ordered to the property room where he was
27 placed in a "fenced like cage." Nash appeared 15 minutes later, and told McDonald that she was
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1 refusing to provide his stereo because it has a U.S.B. port and Bluetooth capability, which Nash
2 claimed could allow McDonald or other inmates to access the internet.

3 The stereo McDonald wanted isn't prohibited by prison regulations; the same stereo is
4 being used in the inmate commissary building. That's how McDonald decided which stereo he
5 wanted to purchase. McDonald explained that Nash was mistaken; if Nash read the owner's
6 manual, she'd discovery that no internet access was available to the stereo's operator. Nash wasn't
7 convinced.

8 Nash held a cellphone to her chest during their conversation and McDonald saw she was
9 recording it. Nash violated policy having her cellphone, which has internet access, on the yard. In
10 a panicked comment, Nash told McDonald that he was wrong. But Nash was unable to cite a
11 regulation confirming her position and quickly left.

12 On March 28, 2022, McDonald had a teleconference with Barnum about the matter with
13 Nash denying him the stereo. Barnum was unable to verify Nash's claims that the stereo could
14 permit internet access. Barnum offered two alternative stereos for McDonald to purchase, which
15 McDonald agreed to consider. On April 8, 2022, McDonald was ordered to report to the property
16 room where he met a corrections officer who gave him a piece of paper describing a Sony stereo
17 and told McDonald that Nash had personally approved and dated it. McDonald then signed the
18 paper to confirm receipt.

19 McDonald felt like he was being forced to purchase the stereo. The stereo that
20 McDonald purchased—the one Nash approved—has a cassette tape with a recording function.
21 Department and prison policies expressly prohibit inmates from having appliances with recording
22 capabilities.

23 On April 29, 2022, Nash called McDonald to the administration building so she could
24 gloat about not allowing him to have a stereo of his own choosing. Several inmates saw McDonald
25 leave the building. Within weeks rumors began circulating through the prison that McDonald
26 was an informant and homosexual. Corrections Officers Moreland and Mikeals helped spread
27 these rumors. The rumors placed McDonald's life "in danger." McDonald received "multiple
28 threats" after he was labeled an informant and homosexual.

1 Nash's conduct of repeatedly calling McDonald to the administration building and
2 interfering with his purchasing a stereo in settlement of a civil-rights action placed an "extreme
3 amount of stress upon [McDonald]." On December 21, 2021, doctors at Centennial Hills hospital
4 instructed McDonald to avoid stressful situations after he experienced total heart failure/cardiac
5 arrest a day earlier, which happened after he had a conversation with Barnum about Nash's and
6 Moran's actions. McDonald flatlined for about 15 minutes without a heartbeat. McDonald
7 returned to the prison from the hospital on February 17, 2022.

8 On January 24, 2023, McDonald filed this civil-rights action using the U.S. postal service,
9 unaware he was able to use the court's e-filing system. One week later, other inmates, Moreland,
10 and Mikeals directed derogatory comments and accusations to McDonald. They again called
11 McDonald "snitch, faggot, punk ass white boy, bitch, etc." The verbal abuse was frequent and
12 aggressive. Because McDonald did not react violently to the abuse, his friends abandoned him.

13 On February 3, 2023, McDonald was taken into the activity room by five corrections
14 officers, including Mikeals, and ordered to place his hands on the wall. McDonald was told to
15 move all his property from unit 3 to unit 5. The officers refused to allow McDonald to use a
16 property cart. Mikeals told McDonald, "You can write the court if you want, I know what you
17 sent out last month." Understanding that officers were reading his legal filings, McDonald
18 remained silent. Other inmates who were also moving to different units the same day were
19 allowed to use property carts. Inmates and corrections officers in unit 5 harassed and threatened
20 McDonald.

21 On April 16, 2023, McDonald was called slurs like "faggot" and "bitch ass cracker" and
22 accused of being a "snitch" and a "rat." McDonald called his fiancée Sandra Fowler and asked her
23 to call the SDCC administration building and inform them that McDonald needed to be removed
24 from the yard for his safety. Shift Commander Tate told Fowler, "Yeah, we know him. Call back
25 tomorrow and tell it to the chaplain." This implies Tate knew that McDonald might be killed.

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1 McDonald and his cellmate locked down that evening and heard unknown inmates
 2 yelling threats and slurs through the ceiling and ventilation system. It got so bad that McDonald
 3 pressed the button in his cell to alert the control tower that he needed help. No one responded to
 4 McDonald's calls.

5 On April 17, 2023, around 8:00 a.m., McDonald went into the hallway seeking protection
 6 from a corrections officer. Finding no one who could hear him over the noise of inmates in other
 7 units, McDonald returned to his cell but was attacked by about 20 inmates who repeatedly
 8 stabbed him in the neck and back. McDonald was beaten for about three minutes before the unit
 9 officer intervened. McDonald was taken to the activity room, then the infirmary, and finally by
 10 ambulance to the hospital. McDonald suffered a broken nose, fractured eye sockets, stab wounds,
 11 and lasting nerve damage and pain in his hands and arms.

12 B. Analysis of McDonald's claims

13 Based on the allegations above, McDonald sues Charlie Daniels; Brian Williams;
 14 Hutchings; Scally; Jennifer Nash; Moran, Moreland, who has been substituted for John Doe #1;
 15 Mikeals, who has been substituted for John Doe #2; Tate, who has been substituted for John Doe
 16 #3; and numerous other John Doe defendants. ECF No. 8 at 1–3. He seeks declaratory, monetary,
 17 and injunctive relief. *Id.* at 56–57. I liberally construe the FAC as bringing claims based on four
 18 different theories of liability: (1) First Amendment retaliation; (2) First and Fourteenth
 19 Amendment denial of access to the courts; (3) Eighth Amendment indifference to safety needs;
 20 and (4) Fourteenth Amendment Equal Protection violations. I address each theory and any issues
 21 below.

22 I. *First Amendment—retaliation*

23 Inmates have a First Amendment right to file grievances and pursue civil-rights litigation
 24 in the courts, “and to be free from retaliation for doing so.” *Watison v. Carter*, 668 F.3d 1108, 1114 (9th
 25 Cir. 2012); *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005). A retaliation claim in the prison
 26 context has five elements. See *Watison*, 668 F.3d at 1114. “First, the plaintiff must allege that the
 27 retaliated-against conduct is protected.” *Id.* Filing or submitting a grievance, complaint, or lawsuit
 28 about prison conditions or alleged constitutional violations is protected conduct. *Entler v. Gregorie*,

1 872 F.3d at 1031, 1039 (9th Cir. 2017). The form that an inmate's complaint takes—"even if
 2 verbal"—"is of no constitutional significance, and threats to sue fall within the purview of the
 3 constitutionally protected right to file grievances." *Id.*

4 Second, the plaintiff must allege that "the defendant took adverse action against [him]." "Watison,
 5 668 F.3d at 1114. "The mere threat of harm can be an adverse action." *Id.* (cleaned up)
 6 (quoting *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009)). The third factor requires the
 7 plaintiff to "allege a causal connection between the adverse action and the protected conduct." *Id.*
 8 Allegations "of a chronology of events from which retaliation can be inferred is sufficient" at the
 9 screening stage. *Id.*

10 "Fourth, the plaintiff must allege that the 'official's acts would chill or silence a person of
 11 ordinary firmness from future First Amendment activities." *Id.* (quoting *Robinson*, 408 F.3d at
 12 568). "A plaintiff who fails to allege a chilling effect may still state a claim if he alleges [that] he
 13 suffered some other harm that is more than minimal." *Id.* (cleaned up) (quoting *Brodheim*, 584 F.3d
 14 at 1269 and *Robinson*, 408 F.3d at 568 n.11). The fact "[t]hat the retaliatory conduct did not chill the
 15 plaintiff from suing the alleged retaliator does not defeat the retaliation claim" at the pleading
 16 stage. *Id.*

17 And the fifth factor requires the plaintiff to allege that the defendant's retaliatory action
 18 did not advance legitimate goals of the jail. *See id.* (quoting *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th
 19 Cir. 1985)). A plaintiff can sufficiently plead "this element by alleging, in addition to a retaliatory
 20 motive, that the defendant's actions were arbitrary or capricious, or that they were unnecessary to
 21 the maintenance of order in the institution." *Id.* (cleaned up).

22 McDonald arguably states a colorable First Amendment retaliation claim. McDonald
 23 alleges that Moran took adverse action against him by destroying his personal property, including
 24 legal work for pending civil-rights actions, because he filed lawsuits against prison officials and
 25 employees. McDonald was forced to settle *McDonald I* because he did not have the materials he
 26 needed to engage in discovery.

27 Settlement of *McDonald I* included permitting McDonald to purchase a new stereo. Nash
 28 frustrated and elongated the process of McDonald purchasing a stereo, ultimately requiring him

1 to purchase one that violates the prison's rule against inmates having appliances with recording
 2 capabilities. McDonald suffered extreme stress because of Nash and Moran's interference. Nash
 3 purposefully called McDonald alone to the administrative building twice to handle the matter
 4 despite knowing that inmates view other inmates who speak alone with prison administrators as
 5 snitches and informants. Other inmates saw McDonald leave the building both times.

6 Rumors soon spread throughout the prison about McDonald being an informant.
 7 Moreland and Mikeals helped spread the rumors. Inmates threatened McDonald with violence as
 8 a result. Moreland and Mikeals called McDonald slurs and stated he was a snitch after they
 9 learned he filed this civil-rights action. Other inmates joined and the verbal abuse and harassment
 10 increased and became more aggressive. Tate threatened McDonald in front of his entire housing
 11 unit that he would perform a unit shakedown if McDonald filed anymore grievances. McDonald
 12 was ultimately attacked by 20 inmates because Nash, Moreland, Mikeals, and Tate insinuated or
 13 stated that McDonald was a snitch, and Moreland and Mikeals instigated other inmates to harass
 14 and threaten him. The First Amendment retaliation claim may therefore proceed against Moran,
 15 Nash, Moreland, Mikeals, and Tate.

16 ***2. First and Fourteenth Amendment—right to access courts***

17 Prisoners have a constitutional right to access the courts. *Lewis v. Casey*, 518 U.S. 343, 346
 18 (1996). Courts "have traditionally differentiated between two types of access to courts claims:
 19 those involving prisoners' right to affirmative *assistance* and those involving prisoners' rights to
 20 litigate without active *interference*." *Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir. 2011), *overruled on*
 21 *other grounds as explained in Rickey v. Dahne*, 807 F.3d 1202, 1209 n.6 (9th Cir. 2015). Regardless of
 22 whether the plaintiff's access-to-courts claim is about inadequate assistance or active
 23 interference, the plaintiff must show that he or she has suffered an "actual injury." *Lewis*, 518 U.S.
 24 at 349; *accord Silva*, 658 F.3d at 1104 (recognizing that dismissal of pending civil suits was "an
 25 actual injury"). The actual-injury requirement requires a plaintiff to "demonstrate that a
 26 nonfrivolous legal claim had been frustrated or was being impeded." *Lewis*, 518 U.S. at 353.

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1 For an inadequate-assistance claim, actual injury of a legal claim is limited to
 2 nonfrivolous direct criminal appeals, habeas corpus proceedings, and § 1983 actions. *Id.* at 353 n.3,
 3 354–55. The right to affirmative assistance is further “limited to the pleading stage.” *Silva*, 658 F.3d
 4 at 1102. For an active-interference claim, actual injury of a legal claim includes direct criminal
 5 appeals, habeas corpus proceedings, § 1983 actions, and “other civil actions . . . that have a
 6 reasonable basis in law or fact.” *Id.* (cleaned up). The right to litigate without active interference
 7 by prison officials extends beyond the pleading stage. *Id.* at 1103–04 (“we see no reason why such a
 8 right would not exist throughout a prisoner’s litigation efforts”).

9 To properly plead the actual-injury element of an access-to-courts claim, the plaintiff
 10 must identify the underlying cause of action “in accordance with Federal Rule of Civil Procedure
 11 8(a), just as if it were being independently pursued,” and describe the official acts frustrating or
 12 impeding that litigation. *Christopher v. Harbury*, 536 U.S. 403, 415–17 (2002). And for a backward-
 13 looking claim—one that seeks a remedy for a lost opportunity to present a legal claim—“the
 14 complaint must identify a remedy that may be awarded as recompense but not otherwise
 15 available in some suit that may yet be brought.” *Id.* at 404.

16 McDonald alleges that he was forced to settle his claims in *McDonald I* after prison
 17 employees refused to let him send his discovery materials on several occasions, and the law
 18 librarian denied his research request. McDonald alleges these actions happened in July 2021.
 19 McDonald’s right-to-access-courts claims is therefore backward-looking and based on active-
 20 interference by prison officials. The Court is not aware of any Ninth Circuit or U.S. Supreme
 21 Court decision holding that settling a claim can constitute an actual injury for court-access
 22 purposes. Because this case is at the screening stage, I assume without deciding that settlement
 23 can be an actual injury.

24 But there are no factual allegations about the discovery materials McDonald contends he
 25 was not able to send or how his inability to send that discovery impacted his decision to settle the
 26 case. McDonald does not identify the claims he settled in *McDonald I*. And there are no factual
 27 allegations about what McDonald lost when he settled his lawsuit because of prison officials’
 28 interference. This is McDonald’s second attempt to state a right-to-access claim, and he has failed

1 to do so. Moreover, McDonald's vague allegations that prison officials thwarted his discovery and
 2 motion efforts in July 2021 are undermined by the record in *McDonald I*.²

3 In that case, McDonald successfully moved for a discovery extension on July 20, 2021.
 4 *McDonald I*, ECF Nos. 84, 98. Shortly before the extended discovery deadline expired on November
 5 29, 2021, McDonald filed several motions to compel the defendants to provide more fulsome
 6 responses to some of his discovery requests. *Id.* at ECF Nos. 107 to 114. Defendants responded with
 7 points and authorities supporting their position that the motions should be denied. *Id.* at ECF
 8 No. 116. And three weeks later, the parties stipulated to dismiss *McDonald I* with prejudice, stating
 9 they resolved the matter in its entirety. *McDonald I*, ECF Nos. 117, 118. Considering the foregoing, I
 10 find that additional leave to amend would be futile. The First and Fourteenth Amendment right-
 11 to-access-courts claim is therefore dismissed with prejudice.

12 ***3. Eighth Amendment—indifference to safety needs***

13 “Prison officials have a duty to take reasonable steps to protect inmates from physical
 14 abuse.” *Hoptowit v. Ray*, 682 F.2d 1237, 1250 (9th Cir. 1982), abrogated on other grounds by *Sandin v.*
 15 *Conner*, 515 U.S. 472 (1995). To establish a violation of this duty, the plaintiff must show that
 16 prison officials were deliberately indifferent to serious threats to the inmate’s safety. *Farmer v.*
 17 *Brennan*, 511 U.S. 825, 834 (1970). To meet this standard, the plaintiff must show that “the official
 18 [knew] of and disregard[ed] an excessive risk to inmate health or safety; the official must both be
 19 aware of facts from which the inference could be drawn that a substantial risk of serious harm
 20 exists, and [the official] must also draw the inference.” *Id.* at 837. The plaintiff can rely on
 21 circumstantial evidence to show the prison official knew about the risk. *Id.* at 842.

22 McDonald arguably states a colorable Eighth Amendment claim about indifference to
 23 threats other inmates posed to his safety. McDonald alleges that Nash purposefully called him
 24 alone to the administrative building twice to handle the matter of purchasing a stereo despite
 25 knowing that inmates view other inmates who speak alone with prison administrators as snitches
 26 and informants. Other inmates saw McDonald leave the building both times.

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² I take judicial notice of this court’s online docket records, which may be accessed by the public online
 at pacer.uscourts.gov or without a Pacer login and password in the Clerk’s Office during regular business
 hours. Nev. LR IC 1-1(i).

1 Rumors soon spread throughout the prison about McDonald being an informant.
 2 Moreland and Mikeals helped spread the rumors. Inmates threatened McDonald with violence as
 3 a result. Moreland and Mikeals called McDonald slurs and stated he was a snitch after they
 4 learned he filed this civil-rights action. Other inmates joined and the verbal abuse and harassment
 5 increased and became more aggressive. Tate threatened McDonald in front of his entire housing
 6 unit that he would perform a unit shakedown if McDonald filed anymore grievances.

7 After inmates' verbal harassment and threats increased in frequency and aggression,
 8 McDonald asked his fiancée Sandra Fowler to contact prison administrators to move him to
 9 another yard for his safety. Fowler spoke with Tate, who acknowledged he knew McDonald and
 10 said to raise the issue tomorrow with the chaplain. McDonald and his cellmate tried to get help
 11 from corrections officers that evening by pressing the button in their cell, but no one responded.
 12 The prison does not have intercoms in the cells, only buttons to alert officers in the tower that
 13 help is needed.³ McDonald tried to get help from corrections officers the next morning but was
 14 violently assaulted when he returned to his cell after failing to get anyone's attention. McDonald
 15 was seriously injured in the attack.

16 Liberally construed, the allegations arguably state that McDonald was attacked by other
 17 inmates because Nash, Moreland, Mikeals, and Tate insinuated or stated that McDonald was a
 18 snitch, and Moreland and Mikeals instigated other inmates to harass and threaten him. These
 19 allegations are sufficient to state a colorable claim for screening purposes. *See Valandingham v.*

20 ³ McDonald might be attempting to state an official-capacity claim for injunctive relief against
 21 supervisory or administrative defendants for this constitutional tort under the theory that a policy caused
 22 his injury. McDonald fails to state a colorable claim under this theory. McDonald's bare conclusion that
 23 cells contain call-buttons instead of intercoms because the department or prison has a policy against
 24 intercoms is not enough to plausibly allege such a policy exists, or that any of these defendants is
 25 responsible for enacting or continuing it. McDonald does not seek an affirmative injunction requiring
 26 the department or prison to adopt and apply a policy of installing intercoms in the cells at SDCC. And a claim
 27 for that injunctive relief is likely moot because McDonald has been transferred to another prison. *See Preiser*
v. Newkirk, 422 U.S. 395, 402–03 (1975) (holding that a claim for injunctive relief was moot after the
 28 prisoner had been returned to a medium security prison and would be eligible for parole within days of
 decision); *Johnson v. Moore*, 948 F.2d 517, 519–22 (9th Cir. 1991) (holding that a claim for injunctive relief
 related to a prison's policies is moot where a prisoner has been transferred to another facility and shows no
 reasonable expectation of return); *see also Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (explaining that
 exception to mootness when case is capable of repetition yet evading review is limited to exceptional
 circumstances where there is a reasonable expectation that the same complaining party would be subject
 to the same action again); *Reimers v. State of Or.*, 863 F.2d 630, 632 (9th Cir. 1988) (explaining that “[c]ourts
 are reluctant to invoke [the exception to mootness] when the possibility of recurrence for the [litigant]
 depends upon his own wrongdoing”).

1 Bojorquez, 866 F.2d 1135, 1138 (9th Cir. 1989) (holding that inmate stated a cause of action when he
 2 alleged that prison officials labeled him a “snitch” with the intent of having him killed by other
 3 inmates). But McDonald’s bare allegation that Fowler called “SDCC’s Administration” before the
 4 attack to warn about threats to McDonald’s safety falls well short of stating that NDOC Director
 5 Charles Daniels, NDOC Associate Director Brian Williams, SDCC Warden Hutchings, or SDCC
 6 Associate Warden Scally knew about the call or Tate’s response, failed to reasonably respond, and
 7 are thus liable for this constitutional violation in a supervisory capacity. See *Hyde v. City of Willcox*,
 8 23 F.4th 863, 874 (9th Cir. 2022) (explaining that supervisors can be held liable under § 1983 for
 9 only (1) “their own culpable action or inaction in the training, supervision, or control of [their]
 10 subordinates;” (2) “their acquiescence in the constitutional deprivation of which a complaint is
 11 made; or” (3) “for conduct that showed a reckless or callous indifference to the rights of others”)
 12 (quoting *Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir. 2000)). The Eighth Amendment safety-
 13 threats claim may therefore proceed against Nash, Moreland, Mikeals, and Tate.

14 ***4. Fourteenth Amendment Equal Protection Clause***

15 The Equal Protection Clause of the Fourteenth Amendment is essentially a direction that
 16 all similarly situated persons be treated equally under the law. *City of Cleburne, Tex. v. Cleburne Living*
 17 *Ctr.*, 473 U.S. 432, 439 (1985). To state an equal-protection claim, a plaintiff must allege facts
 18 demonstrating that defendants acted with the intent and purpose to discriminate against him
 19 based upon membership in a protected class, or that defendants purposefully treated him
 20 differently than similarly situated individuals without any rational basis for the disparate
 21 treatment. *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001), *overruled on other grounds by*
 22 *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002); *see also Vill. of Willowbrook v.*
 23 *Olech*, 528 U.S. 562, 564 (2000). The Ninth Circuit explained in *SmileDirectClub, LLC v. Tippins* that
 24 “a class-of-one plaintiff must be similarly situated to the proposed comparator in all material
 25 respects.” 31 F.4th 1110, 1123 (9th Cir. 2022).

26 When analyzing an equal-protection claim, the courts “must first determine the
 27 appropriate level of scrutiny to be applied. If the rule disadvantages a suspect class or impinges
 28 upon a fundamental right, the court will examine it by applying a strict scrutiny standard. If no

1 such suspect class or fundamental rights are involved, the conduct or rule must be analyzed under
 2 a rational basis test." *Giannini v. Real*, 911 F.2d 354, 358 (9th Cir. 1990).

3 McDonald arguably states a colorable Fourteenth Amendment Equal Protection Clause
 4 claim based on a class-of-one theory. McDonald alleges that Moran singled him out from other
 5 inmates when she destroyed his legal work. Moran's action was irrational because she didn't
 6 follow the prison's policies about inmate property, like processing his appeal, and destroyed
 7 McDonald's legal work to retaliate against him. Like McDonald, other inmates who received their
 8 legal work back from Moran were in the general population, pursuing civil litigation in the courts,
 9 and had their property confiscated as unauthorized. Liberally construed, these allegations
 10 arguably state that Moran treated McDonald differently than other similarly situated inmates
 11 without a rational basis for doing so. But McDonald's remaining allegations, including that other
 12 inmates in his housing unit were allowed to send legal mail during the dates he was not, fail to
 13 plausibly state that McDonald is like those inmates in all material respects. The Fourteenth
 14 Amendment Equal Protection Clause claim can therefore proceed against only Moran.

15 **IV. Plaintiff must file notice about how he wants to proceed.**

16 Prisoner civil rights cases under 42 U.S.C. § 1983 generally require significant time and
 17 resources to resolve. These costs are perhaps most acutely felt by incarcerated plaintiffs who
 18 understandably want swift resolution for alleged constitutional violations but often lack the
 19 funds needed to retain an attorney to prosecute their claims. To help minimize these costs, the
 20 court created the Inmate Early Mediation Program, in which eligible § 1983 cases are sent to
 21 mediation after the court screens the complaint. Defendants in cases that the court has referred to
 22 its mediation program have the right not to make any settlement offers, and plaintiffs have the
 23 right not to accept settlement offers. When mediation does not appear likely to be productive and
 24 save resources, the court may choose to remove a case from the program or immediately put the
 25 case on the normal litigation track.

26 I have now screened McDonald's FAC, allowing some claims to proceed and dismissing
 27 the remaining claim with prejudice. This action is eligible to participate in the court's mediation
 28 program, and this appears to be a case where both sides could have productive settlement

1 discussions and save resources. Previously I referred this action to the court's Pro Bono Counsel
2 Program for the purposes of finding counsel willing to be appointed McDonald's pro bono counsel
3 for the limited scope of participating in the court's mediation program. Despite diligent efforts,
4 the court has not located counsel willing to be appointed McDonald's pro bono counsel.

5 McDonald has adequately communicated the basis of his claims and the facts supporting
6 them to the court, and thus appears capable of participating in the court's mediation program
7 himself. Considering the foregoing, and to move this action forward, I give McDonald 30 days to
8 file a notice stating if he wants to either (1) participate without counsel in the mediation program
9 or (2) proceed onto the litigation track. If McDonald elects to participate without counsel in the
10 court's mediation program, I will vacate my order referring this action to the pro bono counsel
11 program, refer this action to the court's mediation program, and defer ruling on the application to
12 proceed *in forma pauperis*. If the parties reach a settlement during the mediation process, McDonald
13 will not be required to pay the \$350 filing fee. If McDonald elects to proceed onto the normal
14 litigation track, then the court will grant his application to proceed *in forma pauperis* and order him
15 to perfect service upon defendants under Federal Rule of Civil Procedure 4.

16 **V. Conclusion**

17 It is therefore ordered that a decision on McDonald's application to proceed *in forma*
18 *pauperis* [ECF No. 1], motion to preserve evidence [ECF No. 11], and motions for a temporary
19 restraining order and a preliminary injunction [ECF Nos. 12, 13] are DEFERRED.

20 It is further ordered that the First Amendment retaliation claim may proceed against
21 Moran, Jennifer Nash, Moreland, Mikeals, and Tate.

22 It is further ordered that the First and Fourteenth Amendment right-to-access-courts
23 claim is dismissed with prejudice because additional leave to amend would be futile.

24 It is further ordered that the Eighth Amendment safety-threats claim may proceed
25 against Jennifer Nash, Moreland, Mikeals, and Tate.

26 It is further ordered that the Fourteenth Amendment Equal Protection Clause claim may
27 proceed against Moran.

28

1 It is further ordered that Charlie Daniels, Brian Williams, Hutchings, and Scally are
2 dismissed without prejudice from this action.

3 It is further ordered that McDonald has until May 3, 2024, to file a notice with the court
4 stating if he wants to either (1) participate without counsel in the court's Inmate Early Mediation
5 Program or (2) proceed onto the normal litigation track.

6 The Clerk of the Court is directed to add Moreland to the docket as a defendant
7 substituted for John Doe #1, Mikeals as a defendant substituted for John Doe #2, and Tate as a
8 defendant substituted for John Doe #3.

9 The Clerk of the Court is further directed to update the docket to reflect that the
10 plaintiff's name is Kenneth G. McDonald.

11 The Clerk of the Court is further directed to send plaintiff Kenneth McDonald a courtesy
12 copy of his first amended complaint (ECF No. 8).

13 || Dated: April 3, 2024


Cristina D. Silva
United States District Judge